REMARKS

Upon entry of the amendments, claims 14, 19 and 26-28 are pending in the application. Claims 14, 27 and 28 have been amended to more clearly define the present invention.

Applicants have recited a listing of all claims readable on the provisionally elected species (IL-10) as requested by the Examiner.

No new matter has been added by the present amendments.

RESPONSE TO ELECTION OF SPECIES

The Election of Species requires the election of a singled disclosed species pursuant to 35 U.S.C. § 121. In response to the requirement for election of species, Applicants provisionally elect IL-10, with traverse. Pending claims 14, 19 and 26-28 read on the provisionally elected species.

Applicants respectfully reserve the right to prosecute the non-elected species in a continuation or divisional application and also respectfully reserve the right to traverse the Examiner's requirement of a restriction/election in a future response to the U.S. Patent and Trademark Office. Furthermore, upon allowance of a generic claim, Applicants understand that they may be entitled to claim additional non-elected species which fully embrace the allowed generic claim.

Applicants traverse the Examiner's requirement for election of either IL-10 or TGFβ. Applicants request modification of the present election requirement under 37 C.F.R. § 1.143. 35 U.S.C. § 121 provides that restriction may be required to one or two or more independent and distinct inventions. However, 37 C.F.R. § 1.141 provides that a reasonable number of species may still be claimed in one application if the other conditions of the rules are met. *See*, MPEP § 806.04(a).

MPEP § 808.01(a) states that only when there is no disclosure of a relationship between species, as described in MPEP § 806.04(b), are the species considered to be independent inventions for which election of one invention following a requirement for restriction is

mandatory. MPEP § 806.04(b) states that species, while usually independent, may be related under the particular disclosure where species as disclosed and claimed fall under the same genus and are related. Unless the subject matter in a claim lacks unity of invention, it is improper for the Patent Office to refuse to examine that which Applicants regard as their invention. *In re Weber*, 580 F.2d 455, 198 USPQ 328 (CCPA 1978); *In re Haas*, 580 F.2d 461, 198 USPQ 334 (CCPA 1978); *In re Harnish*, 631 F.2d 716, 206 USPQ 300 (CCPA 1980); and *Ex parte Hozumi*, 3 USPQ2d 1059 (Bd. Pat. App. & Int. 1984).

The Examiner has stated that the basis for this election is that the structure and function of IL-10 and TGFβ are distinct. Applicants submit that the structure and function of IL-10 and TGFβ is completely unrelated to subject matter disclosed in the instant specification and recited claims 14, 27 and 28, as amended herein. Specifically, IL-10 and TGFβ are members of the same genus (cytokine superfamily) and as described and claimed are related, as their induced production follows administration of the claimed composition to a subject and precedes the inhibition of at least one atherosclerosis-related symptom. *See*, claims 14, 27 and 28 and specification at page 3, lines 10-14; page 13, lines 16-19; page 18, lines 14-15; page 20, lines 19-21. Since IL-10 and TGFβ fall under the same genus and are related under the particular disclosure as described in MPEP § 806.04(b) and MPEP § 808.01(a), Applicants submit that IL-10 and TGFβ are not independent and distinct and that claims 14, 27 and 28, as amended herein, do not lack unity of invention. Therefore, Applicants submit that this requirement for election of species is improper.

Further, Applicants submit that since IL-10 and TGFβ are not independent and distinct, as described *supra* (they are members of the same genus and related as described and claimed in the instant invention), including both IL-10 and TGFβ, as recited in claims 14, 27 and 28 would not unduly burden the Examiner's search.

Therefore, for at least these reasons stated, Applicants request modification of the election requirement to include IL-10 and TGFβ as set forth in the present claims.

CONCLUSION

On the basis of the foregoing amendment and remark, Applicants respectfully submit that the pending claims are in condition for allowance. Should any questions or issues arise concerning this application, the Examiner is encouraged to contact the undersigned at the telephone number provided below.

Respectfully submitted,

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